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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 575

CHARLES KEEBLE,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Courts of Appeals for the Eighth Circuit, entered in this cause on July 9, 1965.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 9, 1965. A timely petition for rehearing was overruled on August 16, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

QUESTIONS PRESENTED.

I.

Where the relevancy of the document is dependant upon its being the document of a specific date, may the Court admit the document into evidence where an unexplained ambiguity exists as to the date of the document?

II.

Was petitioner deprived of due process when a fact known to the government respecting the identity of a document was not revealed to the court?

III.

Whether the courts have granted to the prosecution, carte blanc, to make improper argument respecting their personal belief in the credibility of witnesses and the guilt of the accused by indicating his personal knowledge of facts de hors the record.

STATUTES INVOLVED.

28 U. S. C., Section 1732: Record made in regular course of business; photographic copies.

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of

such act, transaction, occurrence or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter.

"All other circumstances of the making of such writing of record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in the section, includes business profession, occupation, and calling of every kind."

STATEMENT.

Charles Keeble, Petitioner, was charged in a one count indictment with the crime of perjury in that he had testified falsely while under oath before a trial examiner of the National Labor Relations Board. Upon trial of the charge before a jury in the Eastern District of Missouri, Southeastern Division, petitioner was convicted (R. 338). He was subsequently sentenced to thirty months imprisonment.

Charles Keeble was the Secretary-Treasurer of Local 916 of the International Hod Carriers and Common Laborers Union of America, AFL-CIO, hereafter sometimes called the union (R. 269). In October, 1962, a hearing was held before Eugene E. Dixon, a trial examiner, upon a complaint made by Owen Langston charging the union with an unfair labor practice involving picket line violence (R. 5, 6).

Owen Langston, a resident of Salem, Arkansas, in May of 1962 was clearing right of way for electric power lines near Ellington, Missouri, under a contract with Southern Engineering Company (R. 179, 180).

On May 9, 1962, there was a large gathering of men and automobiles at a roadside park on the east side of Highway 21, a few miles north of Ellington, Missouri, at about 7:30 A. M. (R. 90, 131). At approximately 8:00 A. M., there was a disturbance along the right of way near what has been designated the Allen Farm, which gave rise to the complaint before the National Labor Relations Board (R. 80, 81, 135, 136, 189).

During the hearing it became material to inquire whether Mr. Keeble was at the Wayside Park at Ellington, Missouri, around 7:30 A. M. and whether he was at the Allen Farm near Ellington, Missouri, around 8:00 o'clock A. M. on May 9, 1962. He testified under oath that he had left the Wayside Park at about 6:15 to 6:30 A. M. on that day and that he was at what is known as the Taum Sauk Project, quite some distance from Ellington, around 8:15 A. M. on that date (R. 23, 26). The indictment charged that this testimony was false.

The Government's evidence tends to show that on May 9, 1962, around 7:00 to 7:30 A. M., there was a gathering of about 100 men at a roadside park (R. 76, 90). This park is located about three miles north of Ellington, Missouri, on the east side of Missouri Highway 21 (R. 130). It is about 450 to 600 feet long (R. 93, 164). The park is half moon shape and sets 15 to 20 feet higher than the road (R. 131, 161).

Freddie Pyrtle, who was on Probation for burglary and who had previously been convicted of destruction of Federal property, testifying for the Government (R. 73, 82, 83, 84), stated that on May 9, 1962, he rode out of the roadside park with his brother-in-law at about 7:00 o'clock in the morning (R. 75, 76, 96). There were about 25 cars and 100 men there (R. 90, 91). Mr. Keeble and Mr. Wilson were in the park.

He then went to the Allen Farm and while he was there, there was some arguing and a fight (R. 81, 82). Mr. Keeble and Mr. Wilson remained at the roadside park; they were not at the Allen Farm (R. 79, 82, 100). He had testified at the N. L. R. B. hearing in October of 1962 that he had seen Mr. Keeble and Mr. Wilson on May 9, 1962 (R. 86, 88). He claimed to have lied at that hearing because Mr. Wilson had threatened him (R. 110, 111). He, however, testified that the threat had been made before he gave an affidavit to the government which conformed substantially to his trial testimony (R. 111, 112, 120, 121).

Owen Langston, the contractor who brought the unfair labor charge against Mr. Keeble, was riding in a pick-up truck driven by Lester Utley (R. 141). They each testified on behalf of the Government that they saw Mr. Keeble and Mr. Wilson in the roadside park among the trees with a large number of men as they passed the park at a speed of 30 to 40 miles per hour (R. 130, 131, 145, 165, 185, 199, 200). Mr. Utley testified that they were going too fast to get a good description of Mr. Keeble (R. 160). They further testified that they saw Mr. Keeble at the Allen Farm that morning (R. 133, 134, 168, 169, 187).

On behalf of petitioner, Mr. Woodrow Wilson and Mr. Keeble testified that they were together and left the roadside park at about 6:30 A. M., and that they were at the Taum Sauk project some 50 to 60 miles away at about 8:15 to 8:30 o'clock A. M. (R. 260, 263, 271, 275, 278, 257). Their testimony was corroborated by Bill G. Tinker, assistant to the equipment superintendent at the Taum Sauk project, and Louie Hawkins, a shop steward on the project (R. 230, 231, 233, 249, 250).

Exhibit "3" was admitted into evidence as the visitors log at the Taum Sauk project for May 9, 1962 (R. 55).

Defendant objected to its admission on the ground that the log was hearsay and because it was not properly identified.

An examination of the exhibit reveals that it consists of two pages. On the front page it contains the notation "May 9—62". May 9, 1962, was a Wednesday. On the second sheet on the signature line the date is indicated as "Mon.", indicating Monday, after which a part time guard, Everett Crawford, signed his name (Exhibit "3").

This ambiguity was not brought to the attention of the court in the trial. However, it was discovered in the subsequent trial of Woodrow Wilson that the government was aware of the ambiguity. Mr. Crawford there testified that the FBI had questioned him concerning the discrepancy, but he had no independent recollection of the events and could not explain the discrepancy (Woodrow Wilson v. United States, R. 62, 63, 72, 73, 78).

John A. Barker, the office manager of the Taum Sauk project, brought the exhibit with him as its custodian. He had no personal knowledge as to the accuracy of the log; he had never had any reason to check the logs (R. 31, 33, 38, 37, 51).

Everett Crawford testified that he was employed at the Taum Sauk project in May of 1962. He did odd jobs and worked three days a week as relief guard (R. 52, 57). Exhibit "3" is in his handwriting (R. 53). The only way he had of knowing that he worked as a guard that date was by the log. Except for the date and his signature, he couldn't remember whether he was there or not (R. 53, 56).

The first page of the log indicates that Mr. Keeble had checked in at 10:30 A. M. and left at 12:30 P. M. (R. 34).

Business agents of the unions and peace officers had permanent badges and when the guard recognized them he would wave them on in (R. 58). There were times when the guard would be busy and he would wave the business agent in and enter his name on the log later (R. 59). When he logged a person in that would be the first time he had seen that person on the project that day. A person could be on the project as much as four hours and he wouldn't know it (R. 63, 64). The company was not interested in the time visitors came in so much as who went on the project (R. 66).

In his summation, the United States attorney expressed his own belief in the credibility of the witness the following occurred:

> ". . . I am going to tell you about Freddy Pyrtle. I am going to tell you he is telling the truth in this case. That has come out. There is no question, no question about it. There is a little background and I cannot go into it . . ."
>
> Mr. Bruntrager: "Your Honor, I am going to object to that. It isn't a proper sttaement. If he had proof of that he should have presented it. The statement has nothing to do with it. It is something he did not prove before the court."
>
> The Court: "The jury understands they are bound by the testimony as it comes from the witness stand (R. 312)."

He placed his full personal conviction behind witness Pyrtle, and attempted to explain the witness's reason for changing his statements on at least four prior occasions (R. 119) by laying it at the threshold of fear, basing this on the statement that he, Pyrtle, had been threatened. He related this as follows:

> "Freddy did say at one time he had a threat. He had a threat and I will tell you something about that

boy. I will tell you something about him. When he got on that stand this time there is no question in my mind when he made some of these prior statements on that about you know which way the car went out and who were you riding with and who told you to go out to the park. I will tell you one thing, he has his courage and I am telling you as sure as I am standing here that man used all his courage when he took that stand because when he got on there and he told what he had seen he wasn't afraid any more, but I will tell you this when he got there he does put Keeble and he does put Wilson the other man with the defendant in the park" (R. 313).

He repeated the proposition again, this time placing himself in the position of personally guaranteeing the credibility of the witness over the objection of the defendant:

> "Pyrtle came in here and I will tell you he was telling the truth and I will look anybody right in the eye and tell you he was telling the truth."
>
> Mr. Bruntrager: "I will ask that be stricken and the jury instructed to disregard it."
>
> The Court: "Yes, I understand. It will be stricken and the jury will disregard it. It is a matter for the jury."
>
> Mr. Gilmore: "And I will tell you furthermore Owen Langston was telling the truth . . . (R. 314, 315)."

He later closed his argument by encompassing the other witnesses that appeared with Pyrtle and made a blanket assertion of his personal belief in their integrity, emphasizing again his previous statements:

> ". . . I say to you Freddy Pyrtle, Utley and Langston were telling the truth when they got on that

stand. I say to you that this time we have established beyond a reasonable doubt this case and as I stand here looking at all of you I say this man is guilty as charged and that is what we are asking for you to return . . . (R. 317)."

He also characterized the defense as trumped up, manufactured, saying:

". . . The easiest, biggest most effective type of defense to manufacture is when you got a case where you are supposedly at one location and you say you are somewhere else, you manufacture a defense. You build up a nice story, everybody get together. They discuss it. You bring in your friends. You bring in people working right underneath you practically, at least people depending on you for a livelihood, I would say sort of like brothers in the association, whatever you want to call it. They all come in. So what's it going to be? 'I've been up to the Taum Sauk'—that's a nice big place—Taum Sauk Dam. 'Some of my boys are working up there.' 'We will just get up a little story even though it later is going to Federal Court.' So we make up a long story and then come and put it on the stand here because they know nobody can ever disprove that and they have all thought of that before this of course . . . (R. 310, 311)."

REASONS FOR GRANTING THE WRIT.

I.

The testimony in the trial was in sharp conflict. It is thus apparent that the most important evidence presented by the Government was in its Exhibit "3".

The document on its face could be the log of May 9, 1962, a Wednesday, or it could be the log of Monday, which

would be May 7, 1962. It is thus clearly ambiguous. [This ambiguity was not brought to the attention of the Court in the trial. However, it was discovered in the subsequent trial of Woodrow Wilson that the Government was aware of the ambiguity; Mr. Crawford there testified that the FBI had questioned him concerning the discrepancy, but he had no independent recollection of the events and could not explain the discrepancy. (Woodrow Wilson v. United States, R. 62, 63, 72, 73, 78.)][1]

No attempt was made to explain this ambiguity. 28 U. S. C. 1732 did not do away with the requirement that a record to be admissible must carry with it some guarantee of trustworthiness. Hartzog v. U. S., 4 Cir., 217 F. 2d 706, 709.

To be admissible, the record must be identified; a proper foundation must be laid for its introduction. Imhoff v. Richards, 48 Neb. 59, 67 N. W. 483. In view of the fact that the ambiguity was not brought to the attention of the trial court, the court assumed that this was relevant evidence and it was treated as the log of May 9, 1965, a Wednesday. Yet no one can say that this is in fact that document. The one person who would know, Mr. Crawford, has no independent recollection and except for the date, Monday or Wednesday, and his signature, he couldn't even remember whether he was there or not (R. 53, 56).

The admission of this document purporting to be the log of May 9, 1962 which would state that Mr. Keeble did not arrive at the Taum Sauk Project until 10:30 a. m. was direct proof of the charge in the indictment and highly prejudicial.

In ruling below, the Court completely overlooked and did not rule on the contention that the exhibit had not been

[1] We wish to point out that the Assistant U. S. Attorney who tried the case is a person of high integrity and this situation can only be ascribed to a lack of communication or to oversight.

properly identified though argued and brought to the court's attention in the motion for rehearing.

II.

The fact that the ambiguity which appeared on the second page of the document, was a fact known to the Government and not revealed to the court, deprived petitioner of due process. This is so irrespective of the good faith of the prosecution, Brady v. Maryland, 373 U. S. 83; U. S. v. Zborowski, 2 Cir., 271 F. 2d 661, 668.

III.

The Assistant United States Attorney, as a course of conduct, undertook to express his personal belief in the credibility in the witnesses and undertook to indicate that his belief was based upon matters known personally to him but which were not matters of record.

The court did not hesitate to characterize the Government's argument as improper. However, after uttering what Judge Jerome N. Frank has characterized as the "ceremonial", "deprecatory words"[2], the court followed the growing trend and concluded that the argument was not prejudicial. Illustrative of this trend, the court cited five of its own cases[3] in which they stated that the argument was improper but concluded that the unfair argument was not prejudicial, none of which was as flagrant as the case at bar.

It will be noted that in this case, the court on only one occasion, actually sustained an objection and ordered the ref-

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[2] Address by Judge Jerome N. Frank, Judge U. S. C. A. 2nd Cir., before Criminal Law Section, A. B. A., August 26, 1953, reported in 15 F. R. D. 93, 97.

[3] Koolish v. United States, 8 Cir., 340 F. 2d 513; Cochran v. United States, 8 Cir., 310 F. 2d 585; Blauner v. United States, 8 Cir., 250 F. 2d 838; Schmidt v. United States, 8 Cir., 237 F. 2d 542; Neubauer v. United States, 8 Cir., 250 F. 2d 838.

erence to the prosecutor's belief in the credibility of witness Pyrtle stricken, and on that occasion the prosecutor followed with an equally flagrant reference to his belief in the credibility of the witness Langston (R. 314, 315).

Sometime, somewhere, the line must be drawn. The concept of harmless error is devouring the concept of a fair trial for the accused. Impropriety condoned today ceases to be improper tomorrow. The effect of the case at bar if left to stand, further dilutes the standards set by this court in Berger v. U. S. (1935), 295 U. S. 78, 88.

CONCLUSION.

For the reasons stated hereinabove, we respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

.....

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By .....
RAYMOND A. BRUNTRAGER,
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MAin 1-0066.

In the Supreme Court of the United States,

October Term, 1965.

No. .....

Charles Keeble, Petitioner,

v.

United States of America.

Proof of Service.

A copy of petitioner's Petition for Writ of Certiorari was served upon U. S. Attorney for the Eastern District of Missouri by placing a copy of same in the United States mail, postage prepaid, and addressed to the aforesaid attorney at his post office address, on this ..... day of Sept. 1965.

.....

S. and B.

APPENDIX.

Opinion.

United States Court of Appeals
For the Eighth Circuit.

No. 17,730.

Charles Keeble,
Appellant,

v.

United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[July 9, 1965.]

Before Van Oosterhout and Ridge, Circuit Judges, and Henley, District Judge.

Henley, District Judge.

This is an appeal from a conviction of the crime of perjury. The one count indictment charged in substance that on or about October 5, 1962, at Ellington, Reynolds County, Missouri, in the Southeastern Division of the Eastern District of that State, appellant, Charles Keeble, willfully gave false testimony as to a material matter in the course of a hearing being conducted by a Trial Examiner of the National Labor Relations Board in violation of 18 U. S. C. A., § 1621. The case was tried to a jury which found appellant guilty. A motion for a new trial was denied, and appellant was sentenced to the custody

of the Attorney General for a period of thirty months. This appeal followed.

The record reflects that on May 9, 1962, appellant was secretary-treasurer of Local 916 of the International Hod Carriers and Common Laborers Union of America. That Union was involved in a dispute with Owen Langston, a contractor who was performing work in the vicinity of Ellington, and on the date just mentioned about 8 o'clock in the morning the dispute between Langston and the Union erupted into violence.

Subsequently, Langston filed an unfair labor practice complaint against the Union with the National Labor Relations Board. The complaint was investigated, and a hearing before Trial Examiner Eugene Dixon was held at Ellington on October 5, 1962, the date of appellant's alleged offense.

In the course of the hearing it became material to inquire whether appellant was at the scene of the disturbance on May 9 while it was going on. He testified under oath that he was not present at the time but was in fact several miles away at the Taum Sauk Dam Project. It is this testimony which the indictment charged was false and perjurious.

The evidence produced in the course of the trial was in sharp conflict, and appellant does not contend that it was insufficient to sustain the verdict. For reversal appellant contends that error was committed in the reception of a certain item of documentary evidence; that the trial judge in the presence of the jury misquoted the testimony of a certain witness, and that the alleged misquotation, while inadvertent, was prejudicial to appellant; and that the closing argument of the Assistant United States Attorney was so improper and prejudicial as to call for a reversal.

As part of its case in chief the Government offered in evidence and the trial court admitted over the objection of appellant a "Visitors Log" maintained at the Taum Sauk Project for May 9, 1962. The bottom three lines of the first sheet of that exhibit reflect that on May 9, three men, including appellant, were admitted to the project area at 10:40 A. M., which was substantially later than the time at which the disturbance involving Langston and the Union had taken place. The exhibit indicates that the three men who entered were Arley Weekley, a carpenter, a Mr. Wilson, a Union representative, and appellant, who was also described as a Union representative. The exhibit reflects that appellant and Wilson left the project at 12.30 P. M.

As foundation for the introduction of the log, the Government called as witnesses John E. Barker, the Project Manager of the Taum Sauk Project, and Everett Crawford, a guard who was on duty at the main gate of the Project from 6:00 A. M. to 2:00 P. M. on May 9, and who actually made the log entries reflecting the arrival and departure of appellant.

The gist of the testimony of Mr. Barker was that the log was kept in the regular course of the contractor's business, that the entries were made by the guard on duty at the main gate, that at the close of each day the log would be turned over to one Palmer who was in charge of personnel and security at the Project, and that subsequently Palmer would turn the logs over to the witness for filing and safekeeping. Mr. Barker produced the log in question in obedience to a subpoena duces tecum.

Mr. Crawford testified that he was on duty during the period above stated, and that he made the entries in the log showing the admission of Weekley, Wilson, and appellant at 10:40 A. M. On cross-examination Crawford

admitted he had no personal recollection of the events reflected by the log; that at times there would be some time lapse between a visitor's entering the Project and the recording of the entrance and time thereof on the log. He was shown a statement which he had given prior to the trial in which he stated that the lapse might be as much as an hour or two, but in his testimony he insisted that it would not have been that long. He was shown certain erasures appearing on the line immediately above the one on which appellant's name appeared and was unable to explain them. He admitted that it was possible that appellant entered the Project at least somewhat earlier than the time shown in the log.

The log was offered for the purpose of proving that appellant entered the Project at 10:40 A. M. on May 9 and not at some earlier hour. The log was, of course, hearsay, and appellant objected to its admission on that basis.

In support of its contention that the log was admissible the Government relies on the Federal Business Records Act, as amended, 28 U. S. C. A., § 1732 (a). That statute is as follows:

> "Section 1732. Record made in regular course of business; photographic copies.
>
> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

Appellant argues that the log is not such a document as falls within the terms of the statute and, further, that in any event the concessions of Crawford in the course of his cross-examination so impugned the reliability of the log as to render it inadmissible. We do not agree.

That the log consists of a series of "business entries" and falls within the scope of the statute seems clear. The contractors on the Taum Sauk Project had a legitimate interest in recording visits to the Project and in knowing when visitors entered and left the premises, and according to the testimony of Barker and Crawford those records were kept regularly and as part of the contractors' regular routine of business. That the contractors may have been more interested in knowing who came and went than in knowing when they came and went is not material. See **Finegan v. United States**, 8 Cir., 204 F. 2d 105; **United States v. Moran**, 2 Cir., 151 F. 2d 661; **United States v. General Motors Corporation**, 7 Cir., 121 F. 2d 376.

Viewing the testimony of Crawford on cross-examination in the light most favorable to appellant, we think that his concessions about the log entries which have been mentioned simply went to the weight to be given to the log rather than to its admissibility. Cf. **Thomas v. Hogan**, 4 Cir., 308 F. 2d 355; **LaPorte v. United States**, 9 Cir., 300 F. 2d 878; **United States v. Kimmel**, 2 Cir., 274 F. 2d 54.

Hence, we conclude that the trial court acted properly in admitting the log for whatever it might be worth in the eyes of the jury as triers of the facts.

In undertaking to establish that appellant was present at the scene of the disturbance while the violence was taking place the Government relied rather heavily on the testimony of one Freddy Pyrtle, and his testimony occupies 51 pages of the transcript before us. Pyrtle was subjected to direct and cross-examination; he was on redirect twice and on recross three times.

In the course of the proceedings it developed that prior to the hearing before the Trial Examiner Pyrtle had made an affidavit putting appellant at the scene of the violence. At the hearing, however, Pyrtle testified directly to the contrary, but in the course of the trial in the District Court he returned to his original story. He undertook to explain his testimony before the Trial Examiner by saying that he gave it after having been threatened by a Union member.

Counsel for the defendant understandably undertook to undermine Pyrtle's credibility by laying emphasis on his changes of story, and in connection with the alleged threat undertook to show that the threat, if there was one, was made before Pyrtle made his original affidavit, and, therefore, could not have affected his contrary testimony before the Trial Examiner.

At several points in the cross-examination Pyrtle conceded that he received the threat before he made the affidavit. However, on redirect he was asked certain questions and gave certain answers which might or might not be interpreted as statements that the affidavit was made before the threat was received. Those questions and answers were:

"Q. Now, was that the threat to you that was made by Wilson after the affidavit and before the hearing? In other words, was that done before you went down to Ellington to testify?

"A. Yes, sir.

"Q. Was it after you saw those men out at the house with that affidavit?

"A. No, sir."

On recross-examination counsel for the defendant returned to the subject, and the following question was asked and the following colloquy between Court and counsel took place in the jury's presence:

"By Mr. Bruntrager: Q. You said a moment ago that threat had been made after the affidavit, I am sorry, before the affidavit. Pardon me.

"The Court: He said he made it after.

"Mr. Bruntrager: That wasn't the way I recall it.

"The Court: The jury will have to recall the testimony. As I recall it, that is what he has told you every time in response to all questions.

"Mr. Bruntrager: It wouldn't have been cross-examination. I think he could check the record to be sure, Judge. At least that is what he said to me. He did say something different to Mr. Gilmore.

"The Court: It won't take you very long to go back. Go right on back and see it yourself. It is just before the cross-examination. It is up to the jury to remember it. As my notes show it, that is what he said. The jurors have to keep up with the testimony themselves.

"Mr. Bruntrager: Could we go back?

"The Court: You can go back if you want to go back, if you can find it.

"Mr. Bruntrager: Oh, that's all right. We can go on."

As indicated, appellant now contends that the Court misquoted the testimony of Pyrtle, and that the misquotation was prejudicial. We find the contention to be without merit.

It is not at all clear that there was any misquotation by the Court. Assuming *arguendo,* however, that there was a misquotation, we are convinced that no prejudice resulted therefrom. It was already clear to the jury that the testimony of Pyrtle at the trial conflicted with his testimony before the Trial Examiner, and that his testimony before the Examiner conflicted with his earlier affidavit. Also, as noted, Pyrtle had said in the course of the trial that he had made the affidavit after he had received the threat. In going back to the subject counsel was simply undertaking to cover ground which he had plowed already.

In a criminal case it is ultimately the duty of the jury to recall the testimony of the witnesses correctly as the trial judge twice stated in the course of the colloquy which has been quoted. Further, counsel for the defendant was given ample opportunity to have the court reporter review his notes so that it might be ascertained exactly what Pyrtle had said. Counsel did not avail himself of that opportunity and elected not to pursue the matter further. When he did so, we think that he waived any right to complain of the Court's misstatement of the testimony, if there was such a misstatement.

In the course of his final argument the Assistant United States Attorney who was trying the case for the Government undertook to bolster the credibility of Pyrtle and to a lesser extent that of Langston by stating in effect that he personally believed that they were telling the truth and by indicating, at least to some extent, that his belief was based on knowledge of facts which had not been proven in evidence. On several occasions in the

course of the argument counsel for the defendant objected to the statements that were being made.

We say without hesitation that the portions of the Government's argument under consideration were improper. While a federal prosecutor should present and argue his cause with vigor, he should not permit his zeal to carry him beyond the bounds of fair play. He should not in general indicate to the jury that he has a personal belief, apart from his interpretation of the evidence, that a defendant is guilty or that the Government witnesses have told the truth, and he certainly should not say or suggest to the jury that his belief is bottomed on a knowledge of facts which for some reason he has not or could not prove by competent evidence. **Berger v. United States,** 295 U. S. 78; **Taliaferro v. United States,** 9 Cir., 47 F. 2d 699.

On the other hand, not every impropriety of argument calls for a new trial or for a reversal of a judgment of conviction. And appellate courts should not reverse for such improprieties unless persuaded that they probably prejudiced the defendant and that the prejudice was not removed effectively by the trial judge before the submission of the case to the jury. See **Koolish v. United States,** 8 Cir., 340 F. 2d 513; **Cochran v. United States,** 8 Cir., 310 F. 2d 585; **Blauner v. United States,** 8 Cir., 293 F. 2d 723; **Neubauer v. United States,** 8 Cir., 250 F. 2d 838; **Schmidt v. United States,** 8 Cir., 237 F. 2d 542.

The record discloses that each time counsel for the defendant objected to the argument of the Assistant United States Attorney the able and experienced trial judge promptly admonished the jury that they were limited in their consideration to the evidence in the case, and that they should judge the demeanor of witnesses by their own observations of them on the witness stand. The trial judge evidently felt that no further action was necessary

on his part with respect to the Government's argument, and that was a matter which rested largely in his riscretion. **Cochran v. United States**, supra, 310 F. 2d 589.

While the assignment of error now being discussed has given us some concern, we are persuaded that on balance it cannot be said that any prejudice resulting from the closing argument was not removed by the admonitions of the Court. To put it another way, we cannot say that the trial judge abused his discretion by not reprimanding the Assistant United States Attorney or declaring a mistrial. In the latter connection it is noted that appellant did not ask for a mistrial.

No error appearing the judgment of the District Court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 575

CHARLES KEEBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 14–23) is reported at 347 F. 2d 951.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1965. A petition for rehearing was denied on August 16, 1965. The petition for a writ of certiorari was filed on September 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

790-418—65

QUESTIONS PRESENTED

1. Whether a record admitted as made in the regular course of business should have been excluded because of an ambiguity.

2. Whether argument of government counsel constituted reversible error, where the judge gave corrective instructions with respect thereto.

STATUTE INVOLVED

28 U.S.C. 1732, entitled "Record made in regular course of business; photographic copies," provides:

> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

STATEMENT

After a trial before a jury in the United States District Court for the Eastern District of Missouri, petitioner was convicted of perjury while testifying under oath at a hearing conducted by a trial examiner of the National Labor Relations Board, in violation of 18 U.S.C. 1621. He was sentenced to thirty months' imprisonment. The court of appeals affirmed (Pet. App. 14–23).

On May 9, 1962, petitioner was the secretary-treasurer of Local 916 of the International Hod Carriers and Common Laborers Union, of which Woodrow Wilson was the president and business representative (R. 255). At 8:00 a.m. on that date violence erupted at the Allen Farm near Ellington, Missouri, as a result of the union's efforts to organize a construction crew of which Owen Langston was the supervisor (R. 79–80, 134–135).

As a result of the altercation, Langston filed an unfair labor practice complaint against the union with the National Labor Relations Board (R. 4–5, Govt. Exh. 1). A hearing was held at Ellington on October 2–5, 1962. In the course of the hearing, it became relevant upon the issue of the union's fault whether its officers had been in the vicinity of the Allen farm when the violence occurred. In sworn testimony (R. 8, 21, Govt. Exh. 2), petitioner denied ever appearing at the Allen Farm on the date of the violence. He testified that on May 9 he and Wilson were at a road-

side park near Ellington at about 6:15 a.m., where they received five union authorization cards from William Larkin, a foreman of one of two crews working on the construction project. He further testified that, from the park, the union officers proceeded to the Taum Sauk Hydroelectric Dam project (R. 25), where they arrived at about 8:15 a.m., and departed at 10:00 a.m. It is this testimony which the indictment charged as false and perjurious.

At the trial, three eyewitnesses stated that they saw petitioner either at the roadside park at about 7:30 a.m., or at the Allen Farm at the time the violence erupted (R. 79, 130, 133, 153, 184, 185, 187). In addition, the visitor's log at the Taum Sauk project for May 9, 1962, was introduced in evidence as a record kept in the ordinary course of business (R. 34, 55, Govt. Exh. 3). The log entries were recorded by the guard at the main gate, who had no independent recollection of the time petitioner and Wilson arrived and departed (R. 56). An entry in the log showed that petitioner and Wilson had arrived at 10:40 a.m. and departed at 12:30 p.m. (R. 35, Govt. Exh. 3). Contrary to his prior statement, the guard insisted that the time recorded was relatively accurate, and would not be in error by two hours (R. 60). The guard could not explain an erasure appearing on the line above where the information about petitioner was recorded and conceded the possibility that the petitioner could have entered the project somewhat earlier than the time recorded if he had first gone to the dam site (R. 63). On the second sheet of the log sheet

there appeared the letters "Mon," although the day in question was a Wednesday. Neither side questioned the guard about this writing. Petitioner and Wilson testified that they drove through the main gate at 8:30 a.m. and were waved on by the guard (R. 258, 276, 282).

ARGUMENT

1. Petitioner argues that the letters "Mon" on the second page of the log of visitors at the dam project (although the log was dated May 9, 1962, a Wednesday) created such an ambiguity in the record that the government acted improperly in offering it and the court erred in permitting it to be introduced. This objection was not raised at the trial, although petitioner had every opportunity to examine the log before it was admitted into evidence (R. 33). The record of trial shows that petitioner's counsel scanned the document closely and, in addition, referred to many portions of it while conducting a vigorous cross-examination of the records custodian and the guard (R. 42, 64, 69, 70). Petitioner makes no showing even now that there was any reason to doubt that the record was, in fact, of visitors on May 9. Despite the lack of personal recollection by the guard, the correctness of the date might well have been established by other means if any issue had been raised with respect thereto. For example, it may be that there was another log for Monday, May 7, or that the log for May 9 appeared in the book after the log for May 8. In short, petitioner cannot now raise this factual issue which he did not raise at the trial, although given every opportunity to do so. Finally, we note that

even if an ambiguity in the log had been found to exist, it would not necessarily destroy the admissibility of the log under 28 U.S.C. 1732. See *LaPorte* v. *United States*, 300 F. 2d 878 (C.A. 9).[1]

2. The remarks by government counsel which petitioner relies upon (Pet. 7–9) do not constitute a basis for reversal. The remarks as to the nature of the defense (R. 310–311, Pet. 9) are supported by the evidence. The remarks as to the veracity of the witness were evidently generated by defense counsel's own stinging comments upon the credibility of the witnesses (R. 300–303). See *Lawn* v. *United States*, 355 U.S. 339, 359. Moreover when defense objections were made, the court made it clear to the jury that its own recollection governed. For example, the court stated: "The jury will have to recall the testimony. They know that. It isn't what you people state about it but what was said from the witness stand" (R. 294). Later the court instructed that "The jury understands they are bound by the testimony as it comes from the witness stand" (R. 312).

[1] The cases cited by petitioner are not on point. In *Hartzog* v. *United States*, 217 F. 2d 706 (C.A. 4), the court held inadmissible certain worksheets made by a deceased deputy commissioner of internal revenue in preparation for prosecution, because they were the work product of his judgment rather than contemporary memoranda of events. In *Brady* v. *Maryland*, 373 U.S. 83, certain extrajudicial statements favorable to the accused were intentionally suppressed by the prosecution; petitioner alleges no such suppression here. In *United States* v. *Zborowski*, 271 F. 2d 661 (C.A. 2), the judgment was reversed because the trial court denied the accused access to the grand jury records although there were demonstrated inconsistencies in testimony.

Twice more the court rendered similar instructions after defense counsel objected to certain of the prosecutor's remarks (R. 313, 316), and on the latter occasion he stated, "Anything you attorneys say anything about that is different from their understanding of it they will not consider. They rely on their understanding of the record." Thus the trial judge took appropriate corrective action each time an objection was made and petitioner did not request a mistrial (Pet. 23). The court of appeals properly determined in these circumstances that the trial judge did not abuse his discretion by failing to grant a mistrial on his own motion. See *Isaacs* v. *United States,* 301 F. 2d 706 (C.A. 2), certiorari denied, 371 U.S. 818; *United States* v. *Antonelli Fireworks Co.,* 155 F. 2d 631 (C.A. 2), certiorari denied, 329 U.S. 742; *Cochran* v. *United States,* 310 F. 2d 585 (C.A. 8).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1965.

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